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Commenter: Hyperion Telecommunications, Inc.
Applicant: BellSouth
State: Louisiana
Date: August 28, 1998

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

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Second Application by BellSouth
Corporation et al. for Provision of
In-Region, InterLATA Services in
Louisiana)

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CC Docket No. 98-121

**REPLY COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.
IN OPPOSITION TO BELL SOUTH'S SECOND APPLICATION
FOR INTERLATA AUTHORITY IN LOUISIANA**

Hyperion Telecommunications, Inc. ("Hyperion"), through undersigned counsel, hereby submits its reply comments on the second Section 271 application for in-region interLATA authority in Louisiana, filed by BellSouth Corporation et al. ("BellSouth") on July 9, 1998.

DISCUSSION

As Hyperion showed in its initial comments herein, BellSouth fails to satisfy the competitive checklist in two respects. First, BellSouth does not provide reciprocal compensation, as required by item (xiii) of the competitive checklist, because it refuses to pay reciprocal compensation for traffic terminated to customers of Hyperion who are Internet service providers ("ISPs"), as well as customers of other competitive local exchange carriers ("CLECs") who are ISPs. Second, the performance measurements that BellSouth proposes for its OSS performance are inadequate.

In its Evaluation of BellSouth's application, filed herein on August 19, 1998, the Department of Justice ("DOJ") recommended that BellSouth's application be denied, in part because BellSouth's

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performance measures are inadequate. Hyperion submits that the comments of DOJ (and several other commenters) on this issue, together with Hyperion's own initial comments, thoroughly refute any notion that BellSouth has satisfied the criteria for being allowed entry into the long distance marketplace in Louisiana.

As to the other issue raised in Hyperion's initial comments, however, one commenter, Ameritech, argued that BellSouth is not required to pay reciprocal compensation for traffic terminated to ISPs, on the basis that "a dial-up connection to an ISP is not local traffic, and it is not traffic that terminates at the ISP switch" Ameritech Initial Comments at 9.

At the outset, it should be stressed that, setting aside for a moment BellSouth's and Ameritech's abstract arguments, BellSouth's interconnection agreement with Hyperion expressly obligates BellSouth to pay reciprocal compensation for all "Local Traffic," which is defined as "any telephone call that originates and terminates in the same LATA *and is billed by the originating Party as a local call*, including any call terminating in an exchange outside of BellSouth's service area with respect to which Bell South has a local interconnection agreement with an independent LEC, with which Hyperion is not directly interconnected." Hyperion Initial Comments at 4 (emphasis added). Inasmuch as BellSouth bills its subscribers on the basis that a call to an ISP is a local call, such a call clearly constitutes Local Traffic for purposes of the Interconnection Agreement.

Similarly, under the Commission's regulations, reciprocal compensation must be paid for transport and termination of "local traffic," which the regulations define as traffic that "originates and terminates within a local service area." 47 C.F.R. § 51.701. The Commission has defined

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“termination” as “delivery of [local] traffic from [the terminating carrier’s end office] switch to the called party’s premises.” *Local Interconnection Order*, 11 FCC Rcd 16015, ¶ 1040 (1996). When a call is made to an ISP, the caller dials the ISP’s seven-digit number, and the ISP is the “called party.” The call thus “terminates” at the ISP’s premises, and is “local traffic” under the Commission’s regulations if those premises are within the same local service area as the caller. In recognition of this fact, the Commission has directed local exchange carriers to take any complaints they may have, regarding inadequate compensation for high volumes of traffic to ISPs, to state regulators. *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 346.

Ameritech argues that, notwithstanding all of this, the fact that a user may ultimately interact with the ISP in a way that enables the user to access information on a server in another state makes the initial call to the ISP interstate for jurisdictional purposes, and not “local” for purposes of reciprocal compensation. It cites a number of cases allegedly in support of this contention.

As noted in Hyperion’s initial comments, this argument misses the point – because the information access that the ISP provides is an “information service,” not “telecommunications.” The 1996 Act expressly distinguishes between the two concepts, defining “telecommunications” as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information” (47 U.S.C. § 153(43)); while “information services” includes “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” 47 U.S.C. § 153(20). The Commission has expressly concluded that the Internet access services ISPs provide are

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information services, not telecommunications. *In the Matter of Federal-State Joint Board on Universal Service*, Dkt. 96-45 (Report to Congress) (rel. April 10, 1998) ("*1998 Universal Service Report*"), ¶ 73. *See also In re Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report & Order ¶ 789 (emphasis added) (May 8, 1997).

In short, the telecommunications and information service elements of calls to ISPs are severable. The telecommunications element terminates at the premises of the ISP, and consequently is "local traffic" subject to reciprocal compensation when the caller is in the same calling area. The information service is provided separately by the ISP, is sold by the ISP to its customer, and does not constitute part of the "telecommunications service" that the ISP's customer purchases from his or her local exchange carrier.

None of the cases cited by Ameritech addresses this key point, and none of them goes to the applicability of the reciprocal compensation requirements – and they are therefore irrelevant to the issue here. Moreover, Ameritech has portentously quoted general statements from these cases out of context, without analyzing their appositeness to this situation. For example, in *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992), Ameritech places great stock in the fact that the Commission found that a call to an out-of-state voice mail service is an interstate call. But this would be an ordinary interstate long distance call that happens to terminate onto a voice mail device; it should surprise no one that such a call is deemed interstate for jurisdictional purposes. Undoubtedly, a local call to the same device would be treated as local, even if the voice mail subscriber was able later to pick up his messages from

another state. Similarly, an interstate long distance call that terminates at an ISP is interstate, just as it would be if it terminated at a residence.

Likewise, in discussing *In the Matter of Bell Atlantic Tel. Cos.*, 11 FCC Rcd 6919, Ameritech quotes out of context a description of BellSouth's enhanced Internet Access Service ("IAS"). Ameritech ignores the fact that the end-user was to access IAS by making an ordinary seven digit call, to be paid for by the end-user under standard BellSouth tariffs. BellSouth was therefore treating calls to its own Internet Access Service as local calls. If anything, the case supports Hyperion's position, not Ameritech's.

In its recent decision in *Southwestern Bell Telephone Co. v. FCC*, No. 97-2618, *et al.*, Aug. 19, 1998, at footnote 9, the United States Court of Appeals for the Eight Circuit expressly recognized the distinction between the use of the local network by ISPs and that of IXC's:

ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

The Court's recognition of this distinction clearly supports Hyperion's position and refutes Ameritech's.

Ameritech's position on reciprocal compensation also fails to come to grips with the public interest issue. If CLECs cannot recover their costs for the transport and termination of calls to ISPs, they would face enormous, uncompensated costs, since the overwhelming majority of ISP traffic is incoming, and the overwhelming majority of the incoming traffic comes from BellSouth's

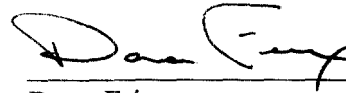
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customers. The result could well be to force CLECs out of the ISP market, giving BellSouth a *de facto* monopoly of this market and resulting in increased costs to ISPs and ultimately their customers. The result would be patently at odds with the public interest.

CONCLUSION

For the foregoing reasons, BellSouth's application should be denied.

Respectfully submitted,



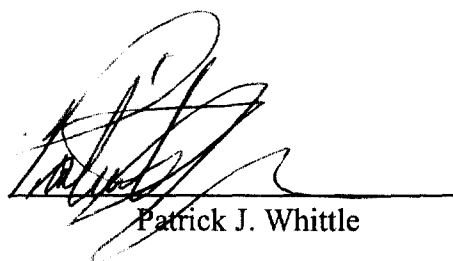
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August 28, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. IN OPPOSITION TO BELLSOUTH'S SECOND APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA were served to each on the attached mailing list, either by Hand Delivery (as designated with an asterisk (*)), or by First Class Mail, postage prepaid, this 4th day of August, 1998.


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